IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1013

PEGGY J. CONNOR, HENRY J. KIRKSEY, ET AL.,

Petitioners,

v.

HONORABLE J. P. COLEMAN, United States Circuit Judge, HONORABLE DAN M. RUSSELL, JR., United States District Judge, HONORABLE HAROLD COX, United States District Judge, and the UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI,

Respondents.

RESPONSE TO MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS, PETITION FOR WRIT OF MANDAMUS, AND BRIEF IN SUPPORT THEREOF

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TABLE OF AUTHORITIES

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COUNTER-STATEMENT OF THE CASE AND STATEMENT OF FACTS

In three orders dated June 25, July 8, and July 11, 1975, the district court (hereinafter referred to as "Respondents" and as "the *Connor* court") formulated the temporary reapportionment plans under which the 1975 Mississippi

legislature's quadrennial elections were held and instructed the parties to file within ninety days plans for the permanent reapportionment thereof. All parties submitted proposed permanent plans. The district court, however, perceiving itself to be in need of guidance from this Court on the then recently-injected issue of racial dilution, entered an order on January 29, 1976, deferring further hearings and decision on a permanent plan pending the resolution of three cases before this Court, i.e., *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976); *Beer* v. *United States*, 425 U.S. 130 (1976); *United Jewish Organization of Williamsburg, Inc.* v. *Carey*, 435 U.S. 167 (1977).

Plaintiffs thereafter motioned this Court for leave to file a petition for a writ of mandamus. On May 19, 1976, this Court, in granting the motion, determined that there then was no occasion for the district court to postpone *any longer* the hearing on the proposed permanent reapportionment plan since two of the cases had been decided subsequent to the district court's entry of the deferral order, and the third case, i.e., *United Jewish Organization of Williamsburg, Inc.* v. *Carey, supra*, presented no question similar to that presented in the case *sub judice*. Accordingly, this Court, although not issuing the writ, stated its view that the district court should schedule a hearing within thirty days on all proposed permanent reapportionment plans to the end of entering a final judgment embodying a permanent plan for the 1979 legislative elections. *Connor* v. *Coleman*, 425 U.S. 675 (1976).

In compliance with this Court's directions, the district court held a hearing on June 15, 1976. On August 24, 1976, the district court ordered into effect a statewide single-member district plan for the 52-member Senate, *Connor* v. *Finch*, 419 F.Supp. 1072 (1976); and on September 8, 1976, the district court ordered into effect a statewide single-member district plan for the 122-member

House, *Connor* v. *Finch*, 419 F.Supp. 1089 (1976).[1] For the first time in the history of the State of Mississippi, counties were fractionalized in the creation of legislative districts. Final judgment was entered and all parties appealed therefrom. This Court noted probable jurisdiction and expedited the consolidated appeals.

On May 31, 1977, while this Court acknowledged that the district court took a substantial step forward in its final decree by eliminating multimember districts, it set aside the decree because of the excessively high population variances in the plans. *Connor* v. *Finch*, 431 U.S. 407 (1977). This Court noted that it did not mean to obscure the significance of the advance by setting aside the decree. *Connor* v. *Finch, supra*, note 27, at 425. It nevertheless remanded the case with directions that the district court approach the task of devising a reapportionment plan not only with a compelling awareness of the need for its expeditious accomplishment, but also with great care.

It is true that, as of this writing, the Respondents have not entered judgment in the case below. It is not true as alleged in the Petitioner's brief (page 4), that "[t]he District Court . . . has . . . once again *delayed* consideration of a permanent court-ordered plan for the 1979 elections." (emphasis added) As will be demonstrated in succeeding parts of this brief, the district court has brought the litigation below to a point where there is a reapportionment plan (hereinafter referred to as "the compromise plan") before the court which is acceptable to Petitioners and Intervenors, and is conditionally acceptable to the Mississippi Legislature as a court-ordered plan. Also before the district court is the legislature's court precinct plan which has substantially the same impact on black voting strength as does the

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[1] In response to Plaintiffs' objections, the district court amended the reapportionment of the House of Representatives in ten districts. The district court further ordered special elections in two House districts. 422 F.Supp. 1014 (1976).

compromise plan.[2] Out of deference to the legislature's efforts to seek Section 5 preclearance, neither plan has been implemented to date.[3]

Defendants below believe that a thorough recitation of events commencing with the Court's opinion in May of 1977 [4] will satisfy this Court that the mandamus relief sought is unwarranted. Defendants therefore present this "Counter Statement of the Case and Statement of Facts" so that the Court will have an accurate picture of the Mississippi reapportionment effort as it now stands and to place the action of the Respondents in proper perspective. When viewed in light of all relevant facts, it will be clear that the status of proceedings below does not warrant the extraordinary relief here sought.

Although this Court in May, 1977, reversed the 1976 district court decision which announced a statewide reapportionment plan because it allowed greater than requisite *de minimus* deviation from one man-one vote, that mandate was not received by the district court until July 28, 1977. (B-2)[4a] The district court promptly responded to the mandate. On August 2, 1977, the district court issued

[2] Two other plans submitted to the district court by Petitioners and Plaintiff-Intervenors are not acceptable because they do not comply with the one-man-one-vote rule. Petitioners' plan, the so-called "Henderson Plan," and the Department of Justice plan, referred to as the "Tanner Plan," are discussed in the affidavit of Thomas Hofeller in Appendix G.

[3] Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973(c), referred to throughout this brief as "Section 5."

[4] *Connor* v. *Finch*, 431 U.S. 407 (1977). The prior history is set forth in abbreviated fashion in that opinion, *id.* 410 413. We believe the only relevant proceedings are those which have occurred since this Court's May, 1977 opinion. However, in order to facilitate the presentation of these events, we have set forth herein the pertinent proceedings immediately leading up to this Court's 1977 decision in *Connor*. A more complete history of earlier events is presented in Appendix A, should the Court desire to review in detail the events prior to 1977.

[4a] References are to the appropriate Appendix and page number.

an order which required the parties and also invited the legislature to file proposed plans with 90 days. *Connor* v. *Finch*, 422 F.Supp. 1014 (1977).

During that subsequent 90-day period, there ensued a flurry of activity by the executive and legislative branches of the government of the State of Mississippi. That the legislature reacted promptly to the invitation of the district court is not subject to dispute; the affidavit of William A. Allain, Esq., Special Counsel to Mississippi in *Connor*, makes this clear beyond serious contention.[5]

On Sunday, August 7, 1977, counsel for the Connor defendants and the legislature met in order to prepare for a meeting with the election committees of each house set for the following day. (B-2; D-1-2) On August 8, 1977, a meeting of the members of the House Committee on Apportionment and Elections and the Senate Committee on Elections was held in the Office of the Attorney General of the State of Mississippi for the purpose of responding to the district court's invitation. (B-2-3; D-1-2) Following that meeting, certain members of the legislature, the Mississippi Attorney General, and the Governor of the State met to discuss the matter. (Ibid.)

On August 9, 1977, the Governor issued a proclamation calling all members of the Mississippi Legislature to convene in special session for the purpose of considering the invitation of the district court. Three days later, on August 12, 1977, the Mississippi Legislature convened in special session and created the Special Joint Legislative Committee on Reapportionment (hereinafter referred to as the "Joint Committee") (B-3; D-1). On the following day. August 13, 1977, the newly-created Joint Committee met and organized. The Joint Committee created a subcommittee to interview and employ experts to assist in the formulation of reapportionment plans. (B-4)

[5] A copy of the affidavit is found in Appendix B to this brief.

At the suggestion of the Mississippi Attorney General, A. F. Summer, the Committee retained as Special Counsel, Mr. Jerris Leonard of Washington, D.C., former Assistant Attorney General of the United States for Civil Rights. (B-3; D-2-3; E-6) The Committee interviewed outside experts on reapportionment suggested by the Attorney General of Mississippi, Special Counsel Jerris Leonard, and Mr. Marshal Turner, Assistant Chief of the Demographic Census Staff of the United States Bureau of the Census. As a result of this process, Mr. Thomas Hofeller of California, Dr. Delbert Dunn of Georgia, Mr. Calvin Webb of New York, and Dr. Richard Morrill of the State of Washington, all experienced in reapportionment, were retained. (B-3-6; D-3-4; D-16-20; D-30; D-39-41)

Before these experts commenced their task, they received legal guidance from the Committee's Special Counsel (B-6; D-20-21; D-36; E-1). Committee experts and staff were instructed to minimize population deviation among districts and to avoid dilution of black voting strength. Subsidiary goals were to observe Mississippi's historic concern for the preservation of county lines and to create compact and contiguous districts. (D-20-21; D-34-37; D-40-41)

The legislature's committee staff, aided by the retained experts, commenced its efforts to construct reapportionment plans for Mississippi in August of 1977. (B-2-3; D-1; D-19-20; D-32; D-40) The committee and its staff pursued a two-fold responsibility — preparation of plans *both* for consideration by the *Connor* court in response to its invitation *and* by the legislature for the purpose of statutory reapportionment.[6] (D-1-4)

The initial plans developed for submission to the *Connor*

[6] Different plans for presentation to the district court and for consideration by the legislature were prepared due to the greater flexibility accorded by this Court to legislatures in apportionment maters. *Chapman* v. *Meier,* 420 U.S. 1 (1974).

court and for enactment by the legislature were based on Census Enumeration District lines (ED's) rather than on precinct lines. (D-23-27; D-35) Precincts in Mississippi have irregular shapes and the lines do not correspond with the census ED lines. There is no census information uniformly available throughout the State of Mississippi by precinct. ED's are the only basis upon which census information is available for the non-metropolitan areas of the state. Therefore, the staff concluded to develop its initial plans based on ED's. (D-23-27) This effort led to public hearings on the Court ED plans commencing on October 11, 1977, and on the Statutory ED plans on November 28, 1977. (D-4-8; D-12-13; D-37-38) Prior to these hearings, statewide public notices were purchased in newspapers and on radio and plans then under consideration were distributed throughout the state for advance study by the public so that there would be opportunity for meaningful comment, including the submission of alternative plans. (B-8; D-9-14; E-7; E-8)

The November hearings led to the adoption of the Statutory ED plans by the House and Senate at a special session of the Legislature called for that purpose in December, 1977. (B-12) The Court ED Plans, which had been the subject of the October hearings, had earlier been submitted to the *Connor* court in Jackson. (Petitioner's Appendix, pp. 4a-5a). Both the Legislature and the court, after reviewing the ED Plans, expressed a preference for plans based on precinct lines. (D-26-27; D-35) The preference for the precinct lines was engendered by a desire to avoid the voter confusion created by the split precincts in the ED Plans which would require re-registration of voters. (D-14-15) Indeed, Plaintiffs and Intervenor in *Connor* had indicated that such confusion would be more detrimental to blacks than whites. (D-15)

Because of the expressed court preference, the Joint Committee staff was directed in late Decmber, 1977, to

convert the ED plans to precinct plans by moving the boundaries of districts based on ED's to the nearest precinct line. (D-24-27) This process was time consuming. In order to convert the ED plans to precinct plans, it was necessary to obtain data for each side of any ED split by a precinct line. Even to begin obtaining this data, the Committee staff was required to draw the "split" of each ED on a census map of the ED and then forward the map to the Census Bureau. The Census Bureau would then perform computations using these maps and workpapers from the 1970 census and return population figures for both sides of the line dividing the ED. (D-26-28)

The Committee staff was well into the effort of converting its ED plans into precinct plans when the plans proposed by the Plaintiffs and Intervenors in the *Connor* litigation first surfaced in final form. In point of fact, the *Connor* Plaintiffs' plan (hereinafter referred to as "the Henderson Plan") was submitted to the *Connor* court on March 23, 1978, the same day the legislature began voting on the Committee's proposals for precinct-based plans.[7] (E-9-10; E-11-12)

Similarly, the Intervenor's plan, (hereinafter referred to as the "Tanner Plan") was filed with the *Connor* court in February, 1978. (Petitioner's Appendix, p. 12a) This was Tanner's second attempt. The first had to be revised due to "several description errors." (H-1) Like Henderson's plan, Tanner's final plan came into being only after the legislative process had germinated for over six months. More

[7] Henderson had earlier submitted plans in October, 1977 (See Appendix page 5a of Petitioners' brief) and a first revision in February, 1978 (See Appendix page 12a of Petitioner's brief). The legislature was simply not in a position even to consider the Henderson plan prior to its final submission because of the drastic changes the plan had undergone. Comparison of the initial draft of the Henderson plan with the final revison reveals that 71 of the 122 house districts changed either in their configuration or in their statistics.

significantly, the Tanner Plan did not make its inaugural appearance until ten months after this Court's May, 1977, decision in the *Connor* litigation.[8] The record of the proceedings below, as detailed in Appendix A to Petitioner's own brief, reflects that it was not until after the lapse of more than a month — until the end of April — that all parties to the *Connor* litigation had filed their proposed reapportionment plans and their respective objections to the plans of party opponents with the court. Moreover, it was not until mid-May, 1978, that the Special Master had filed his proposed findings.[9] The parties were given an opportunity to comment on the Master's plans.

Only by June 5, 1978, then, had all parties to the litigation filed with the court their comments or objections to the plans of the Special Master. (Page 16a of the Appendix to Petitioners' brief). One week later, in an order filed on June 12, 1978, Respondents, having considered the proposed reapportionment plans of the parties, the proposals of the Special Master, and the objections of the parties thereto, made the observation that *"the differences among the various parties as to an appropriate reapportionment of the Mississippi Legislature are so narrow that they could easily be resolved among the parties."* (H-3) The Re-

[8] Analysis by reapportionment experts demonstrated that the Petitioners' plan (Henderson's) and the Department of Justice Intervenors' plan (Tanner's) contained deviations from absolute population equality of 122.72% and 53.02%, respectively, and thus were unusable from the standpoint of one-man-one-vote. (See paragraph 8 of affidavit of Thomas Hofeller, Appendix I-4).

[9] On May 3, 1978, the Special Master filed a plan for the reapportionment for the Mississippi Senate. On May 9, 1978, the Special Master suggested alternatives for certain districts in the plan he had filed 6 days earlier. On May 11, 1978, the Special Master submitted his revised plan for the Senate. On May 15, 1978, the court directed the Special Master to file a final proposal putting his plans for both the House and the Senate into final form. On May 18, 1978, the Master filed his final plan for the reapportionment of the Mississippi Legislature in response to the court's order of May 15. (B-14-15).

spondents thereupon ordered the parties to meet in settlement conference within 15 days to explore every reasonable possibility for entry of a consent decree which would terminate the litigation. (H-3-4)

More than two months prior to the Respondents' order directing the parties to explore settlement, the legislature had enacted legislative reapportionment plans for the Mississippi Senate and House (S.B. 3098 and H.B. 1491, respectively) which were based exclusively on single-member districts for both the House and Senate and utilized precinct lines in lieu of ED lines. The Governor of Mississippi, before signing the bills into law, sought input from black organizations, including the NAACP. In addition, Mississippi Senate and House (S.B. 3098 and H.B. 1491, the Governor sought the view of his cabinet-level multicultural advisory committee with regard to impact of the proposed plans on minorities. His efforts surfaced no complaints from the black community regarding the plans before him for signature. (D-41-44) On April 21, 1978, the Governor of Mississippi approved and signed into law S.B. 3098 and H.B. 1491, the two bills now before the Section 5 Court. (B-14)

On June 1, 1978, S.B. 3098 and the H.B. 1491 were submitted to the Attorney General of the United States for Section 5 preclearance.[10] During the summer months of 1978, the statutory plans languished in the inner sanctum of the Department of Justice in Washington while the parties to the *Connor* litigation were attempting to resolve their differences and reach agreement on a compromise court-ordered plan.

By mid-summer of 1978, the Attorney General of Mis-

[10] The delay in making the submission from April 4, 1978, to June 1, 1978, was caused by the failure of the Department of Justice to make information in its files available. In the end, Mississippi proceeded with its application absent the desired information. (See the affidavit of Jerris Leonard, Esq., Appendix C).

sissippi, had become concerned that the attempts to fashion a reapportionment plan in the lawsuit before the three-judge court in Mississippi would harden and prevent full and fair consideration of Mississippi's statutory plans which were designed to accomplish that same purpose. With that specific intonement in mind, on July 26, 1978, he directed a letter to the Attorney General of the United States (F-5-7) providing, in pertinent part,

> In essence, Mississippi has come up with the best apportionment plan, in all respects, in the United States. It was crafted by experts, who had worked in legislative apportionment in other states and who were guided by the Office of the Attorney General of Mississippi and former Department of Justice Assistant Attorney General for Civil Rights, Jerris Leonard, retained by the legislature. The legislature followed the advice of the experts and its counsel. The members were instructed that no changes requested by them would be implemented when to do so would dilute unacceptable population variances from the computed norm.
>
> * * *
>
> Our present concern is that the lingering effect of differences between Mississippi and the Department of Justice during the apportionment litigation of the past and present not affect fair and impartial consideration of our Section 5 application. We feel that it may be too great a burden and place your Civil Rights Division in an awkward position if they are asked to make a determination on the acceptability of our statutory plan when embroiled in litigation on the same subject matter. This is so because to approve our Section 5 statutory plan, the Civil Rights Division would have to abandon the plan it has been vigorously advocating before the three-judge court in Mississippi.
>
> * * *
>
> We request a fresh prespective on our Section 5 submission. We respectfully request an opportunity to meet with you and have you decide whether the statu-

tory plan enacted by our legislature denies or abridges the right to vote of any citizen in Mississippi on account of race.

Although received in the Department of Justice on the 28th day of July, the letter never reached the Attorney General of the United States (F-1; F-7-8). Attorney General Bell, who may have been out of the country at the time the letter was received, returned prior to the time the Department of Justice decided to act adversely on Mississippi's submission and yet was not consulted.

On August 1, 1978, Mississippi's Section 5 submission was rejected by the Department of Justice on the ground that Mississippi had failed to show that the plan did not have the purpose or effect of discriminating on the basis of race or color. (B-17) On August 1, 1978, Mississippi filed suit before a three-judge district court in the United States District Court for the District of Columbia,[11] (hereinafter the "Section 5 court") pursuant to Section 5 of the Voting Rights Act of 1965, seeking a declaratory judgment that the Mississippi statutory plans (S.B. 3098 and H.B. 1491) do not have the purpose and effect of denying or abridging the right of any citizen in Mississippi to vote on the grounds of race or color. (B-17; G-3)

On August 2, 1978, the *Connor* Defendants filed a Motion to Withhold Announcement of Judgment by the Respondents pending resolution of Section 5 proceedings. (Petitioner's Appendix, p. 17a) The Defendants premised their motion on this Court's June, 1978, pronouncements in *Wise* v. *Lipscomb*, 98 S.Ct. 2493 (1978), and on earlier guidance in this Court's May, 1977, opinion in *Connor*. Mindful of the urgency of these parallel proceedings, however, the *Connor* Defendants — Plaintiffs in the Section 5 litigation in Washington — followed their motion for a

[11] *Mississippi* v. *United States, et al.*, Civil Action No. 78-1425.

stay in Mississippi with an August 12, 1978 motion in the Section 5 case for a speedy hearing on the merits, requesting therein a trial within 15 days of September 15, 1978. On August 21, 1978, the Section 5 court granted the request, requiring the Defendants to answer the complaint for declaratory relief by September 1, 1978, and setting a trial date of September 18, 1978. (G-3) On the opening day of trial, the court granted a motion to intervene by several black citizens and registered voters in the State of Mississippi who held themselves out generally as representatives of the same class sought to be represented by the *Connor* Plaintiffs, i.e., all black citizens and black registered voters of the State of Mississippi. Many of the named intervenors were also named plaintiffs in *Connor*. They employed as counsel, Frank Parker, Esq., who also represents the *Connor* Plaintiffs.

The trial consumed eight days during the period from September 18, through September 27, 1978. In order to expedite the proceedings, Plaintiff (Mississippi) took depositions during trial recesses. At the conclusion, the parties were directed to file post-trial briefs and proposed findings of fact and conclusions of law by October 31, 1978. All parties were thereafter given 15 days to respond to the briefs of opposing parties. (G-6) Arguments were set for January 16, 1979. As of this writing, the case has been fully tried, briefed, and argued and a decision by the court is believed imminent.

At the time the Section 5 suit was initiated, settlement negotiations pursuant to the June 12, 1978, Order of he *Connor* court were nearing a conclusion. (D-45-48) The parties had resolved many differences and had arrived at a plan, the so-called compromise plan, which was acceptable to both the *Connor* Plaintiffs (Petitioners) and the *Connor* Intervenor's (the United States) and which was *conditionally acceptable* to the legislature. The legislature's

reluctant acquiescence [12] was subject to obtaining assurances from the *Connor* Plaintiffs and Intervenors that the compromise plan would not be used by them in any way to prejudice Mississippi's position before the Section 5 court. When the Petitioners refused to enter into the compromise subject to such condition, settlement discussions reached an impasse.

Petitioners then filed a motion for entry of judgment on October 12, 1978. The motion and accompanying proposed order asked the Respondents to enter the compromise plan as their final judgment. The motion has not been ruled upon. The Respondents indicated, at a January 2, 1979, hearing that they would give the Section 5 court an unencumbered opportunity, pursuant to its statutory duty, to pass on the legislature's plans (S.B. 3098 and H.B. 1491). Failing such action by the Section 5 Court in time for the 1979 elections, the Respondents would then enter judgment.

These unfolding events have brought the original *Connor* parties, and now the three-judge tribunal below, once again before this Honorable Court for argument on allied issues.

[12] The legislature was informally surveyed in August concerning the compromise plan. Members were advised that the *Connor* court was suggesting that the alternative to agreement would be a court-imposed plan shrinking the size of the Senate from 52 to 45 and of the House from 122 to 90. Under the threat of this clearly unacceptable alternative, members of the legislature indicated a willingness to subscribe to the compromise plan, but only if it could be done without prejudice to Section 5 proceedings. (Statement of the Mississippi Attorney General, Appendix D-45-48).

ARGUMENT I

THE DEFERENCE SHOWN BY THE DISTRICT COURT TO SECTION 5 PROCEEDINGS BEFORE THE DISTRICT COURT IN THE DISTRICT OF COLUMBIA IS A PROPER EXERCISE OF DISCRETION CONSISTENT WITH THE TEACHING OF THIS COURT IN THIS AND IN OTHER CASES.

Petitioners unabashedly emphasize the passing of a year and a half since remand; accordingly they contend that the Respondents have failed to act promptly in response to the mandate of this Court. Petitioners set forth this fact almost as if they expected a ruling the day the Respondents received this Court's mandate in 1977. Defendant submits that the litigation below is far too complex for anyone, including this Court, to have anticipated a ruling close on the heels of the mandate. Statewide reapportionment by federal courts is always a cumbersome process, even when the only consideration is one-man-one vote. Indeed, the federal district court in Mississippi struggled for a decade with this one-man-one vote problem before concerns regarding the dilution of minority voting strength overlaid the picture. It was the *Connor* court's inability to fashion a plan consistent with one-man-one vote requirement which caused this Court to reverse Respondent's 1976 single-member district plan. *Connor,* 431 U.S. at 421. On remand, the added requirement of avoiding the dilution of minority voting strength and the failure of census enumeration district lines to coincide with Mississippi voting precinct lines have combined further to complicate the difficult task. Thus, to cope with the purely technical aspects of drawing a plan which is consistent with the constitutional requirements of one-man-one vote, which avoids dilution of black voting strength, which causes minimal voter confusion, and which makes sense within the geographical and historical context of the State of Mississippi, requires assistance from experts

on reapportionment and the Bureau of the Census, coupled with utilization of computer technology. (D-16-23; D-31)

In light of these factors, it is clear beyond cavil that the Defendants and Respondents have moved the matter forward expeditiously between the receipt of this Court's mandate on July 28, 1977, and October 12, 1978, when Plaintiffs filed their presently-outstanding motion for judgment.[13] Indeed, we do not here understand Petitioner to be complaining about any of the time consumed by the proceedings below prior to October 12, 1978, nor should Petitioner be heard to so complain.[14] Since October 12, the Respondents have acted to establish the district boundaries necessary to fill legislative vacancies which have occurred since the 1978 legislative session in order that elections to fill these vacancies for the 1979 session may be held. (H-5-6)

Respondents have, however, since October 12, 1978, deferred the entry of final judgment pending disposition of the Section 5 case. Defendants requested the Respondents, by motion of August 2, 1978, to defer entry of judgment pending resolution of the Section 5 case. Defendants believe, and will endeavor to demonstrate herein, that such deference for a limited period of time is a supportable act of judicial restraint consistent with the teachings of this Court in this and in other cases.

Upon remand in 1977, this Court reiterated and emphasized that,

> Legislative reapportionment is primarily a matter for legislative consideration and determination," *Reynolds v. Sims*, 377 U.S. at 586, for a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally-mandated framework of substantial population equality. The federal courts, by contrast, possess no distinct mandate to compromise conflicting state apportionment policies in the people's name. In the wake of a legislature's failure constitutionally to reconcile these conflicting state and federal goals, however, a federal court is left with the unwelcome obligation of performing in the legislature's stead, while lacking the political authoritativeness that the legislature can bring to the task. *Connor*, 431 U.S. at 414-15.

[13] The chronology of the proceedings below, summarized in our Counter-Statement of the Case and Statement of Facts, and set forth in detail in Appendix A, support this conclusion.

[14] Petitioners took from August, 1977 through March, 1978 to draw a plan (the Henderson plan), which turned out to be useless. (See the affidavit of Thomas Hofeller, Appendix I.)

This pronouncement is as much a part of this Court's mandate as that segment upon which Petitioners rely. Intervening events since May of 1977 have not made it at all clear at this time that the federal court must act "in the wake" of the legislature's failure to act. Indeed, the record shows that the legislature and the state's executive officers promptly expended extensive resources in response to the teachings of *Connor* in a good-faith effort to relieve the federal court of this "unwelcome obligation." Whether they have done so successfully will be known shortly.

The proposition that federal courts should make every effort *not* to preempt legislative bodies was underscored by this Court in June of 1978, in *Wise* v. *Lipscomb*, 98 S.Ct. 2493, 2497, citing *Connor, supra* as precedent. This Court then stated in *Wise* that, "whenever practicable [the federal court should] afford a reasonable opportunity for the legislature to meet constitutional requirements rather than . . . to devise *and order into effect* its own plan." *Id.* at 2497. (emphasis added).

Respondents have followed this teaching, observing,

> We think that under the decision of the Supreme Court in *Wise v. Lipscomb*, which was handed down only last June, that it is our duty to give the right-of-way to

> any legislative, statutorily enacted plan. We think the decision says that as plain as it can possibly say it. And the Legislature, of course, has enacted a plan. It is now under submission to a District Court in the District of Columbia, as the law also provides for. And purely on the authority of *Wise v. Lipscomb*, and without further arguing the matter but explaining it in the record, purely on that basis we've been waiting to see what the District Court in the District of Columbia would do about the legislative plan. (Page 7 of transcript of January 2, 1979, hearing, cited at H-5).

On October 12, 1978, when the Petitioners finally made a motion for judgment, the Respondents were aware that trial of the Section 5 case had concluded. The Respondents, at that time, could hardly have been oblivious to the massive effort undertaken by the State to formulate a modern and progressive statewide reapportionment plan and to obtain clearance under Section 5 for that plan. (In addition to the highly-publicized nature of the effort, the detailed chronology had been placed before the court in support of the Motion to Withhold Judgment. [Appendix B]) Thus the Respondents must have been cognizant of the legislature's desire to apportion itself, of the Governor's interest, of the retention of outside counsel with an eminent record of civil rights advocacy, of the retention of outside and impartial technical expertise on reapportionment, of the opportunity for public involvement in the creation of the statutory plans, and of the use of extensive computer technology and assistance from the Census Bureau, which itself characterized the entire effort as thorough, fair, and, above all, professional.

The legislature's reapportionment effort was the first since the *Connor* litigation began which endeavored to formulate an entire plan rather than to modify or adopt plans previously promulgated by a federal court. Further, it was the first legislative reapportionment effort in which the legislature relied exclusively on single-member districts,

and fractured county lines where necessary to meet the one-man-one vote requirement. It was also the first time Mississippi sought assistance of legal counsel and experts from outside Mississippi to advise and participate in a reapportionment effort.

Following this extraordinary undertaking by its legislature, Mississippi has made every effort to expedite Section 5 proceedings in order to realize the fruits of its good-faith effort. Mississippi filed suit seeking declaratory relief the very day it received notice that its submittal to the Attorney General of the United States had not resulted in Section 5 clearance from that office. (B-17; G-3) It moved to expedite the proceedings, requesting a shortened pleading period and early trial date. Every step it has undertaken has been in pursuit of an early disposition. To the contrary, the United States, the Defendant in the Section 5 case and Intervenor below, has attempted to delay the Section 5 proceedings. After taking the full 60 days to review the plan administratively,[15] the United States pled, in papers filed with the Section 5 court seeking reconsideration of that court's August 21, 1978 Order [16] expediting the proceedings, that

> It would be appropriate for this Court to stay the hearing on the merits of plaintiff's request for declaratory relief until a final ruling by the *Connor* court so that

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[15] One of the issues before the Section 5 court is that the administrative review was not meaningful and thus creates no adverse inference to the validity of the proposed plans. Technical review of the complex reapportionment plan was delegated by the Department of Justice to a second-year law student whose background in reapportionment was so limited that he failed to qualify as an expert when offered as a witness during trial of the Section 5 case. (D-44). The Attorney General was never consulted on the matter and the Assistant Attorney General for Civil Rights never read Mississippi's submission. (F-1-2).

[16] See page 1 of the docket sheet at page G-4 of the Appendix.

the statutory plan before this Court may be compared with the plan approved in that litigation. (G-9)

It is our view that the United States sought this delay because it shares Petitioners' preference for reapportionment by court decree to reapportionment by the legislature. Aaron Henry, Chairman of the Mississippi NAACP and Defendant-Intervenor in the Section 5 case, admitted during sworn testimony in the Section 5 proceedings, that if he had two acceptable and *identical* plans, one before a federal court and the other before the legislature, he would prefer enactment of the plan by judicial fiat. (D-48-50)

The Section 5 court, nevertheless, adhered to its decision to expedite the matter. By the time the *Connor* court received Petitioners' Motion for Judgment, the taking of evidence in the Section 5 case had concluded and the parties were in the final stages of preparing post-trial briefs. Had the Respondents decided to enter judgment at that point, a reopening of the record in the Section 5 case might have occurred, injecting a new issue which could have had the effect of delaying a decision by the Section 5 Court.

If there existed major differences between the plan desired by Petitioners in their Motion for Judgment in *Connor* and the statutory plan before the Section 5 court with respect to the treatment accorded black voters, there might be some justification for the instant application.[17] A comparison of the treatment accorded black voters in the *Connor* compromise plan with H.B. 1491 and S.B. 3098 before the Section 5 court, however, reveals little, if any,

[17] Without the imprimatur of judicial decree, the compromise plan was placed in evidence before the Section 5 court, FED.R.EVID. 408 notwithstanding.

difference of significance.[18] Indeed, the plans are so similar in the configuration of districts throughout the State that it seems incredible that anyone would suggest that one set of plans is constitutional and meets Section 5 while the other fails in both respects.

The *Connor* compromise plan is in fact nothing more than a fine tuning of the statutory plans in certain limited areas of the State, designed to bring into better focus the political needs of certain blacks who desire to enhance their own political ambitions, and does not result in a substantial enhancement of the political position of blacks in the state as a whole. According to the experts of the Department of Justice, any district below 60% black voting age population (VAP) does not provide a black candidate a viable chance of being elected.[19] Districts below this number in black VAP percentage become simply "influence" districts. The table in footnote 18 demonstrates that the compromise plan and the statutory plan both contain the same number, sixteen (16), of 60% black VAP districts in the 174 seat legislature (adding the House seats above 60% to the Senate seats above 60%). Nor is there any appreciable gain in black majority VAP districts in the compromise plan. The compromise plan realizes a

[18]

	NO. OF HOUSE SEATS		NO. OF SENATE SEATS	
% Range of Black Voting Age Population	Connor Court Compromise	Section 5 Court H.B. 1491	Connor Court Compromise	Section 5 Court S.B. 3098
50-100%	28	26	11	10
55-100%	22	20	7	7
60-100%	15	14	1	2

This table is based on data obtained from a table at page 6a of Defendant-Intervenors proposed findings of fact in the Section 5 case.

[19] Pages 27 and 28 of the brief of the United States in the Section 5 case.

net gain of three (3) such districts when compared with the statutory plan. This difference, according to the Assistant Attorney General of the United States for Civil Rights, is not significant enough to suggest an improper purpose under Section 5.[20] Neither the Constitution nor Section 5 has ever been held to cut so finely as to distinguish between two plans substantially similar in overall configuration with such negligable, if any, differences in the treatment accorded minority groups.

At a time when elections are not imminent, were the *Connor* Court to announce a court-ordered reapportionment plan which was subsequently superseded by approval of the statutory plan before the Section 5 court, there would necessarily be confusion of voters and unfairness to candidates attempting to qualify for the 1979 quadrenial elections.[21]

The Respondents' evident desire to avoid this unpleasantness is both understandable and justifiable. The District Court in Mississippi has before it a plan which it knows is acceptable to the United States and to the Petitioners here. Respondents have reason to believe that if they enter that plan as their court-ordered plan, those parties would not appeal from such judgment. Further, Respondents know that the plan closely resembles the legislature's statutory plans, having been derived therefrom, and thus appeal by the Defendants is unlikely. Respondents are thus in a position to await, for a reasonable time, final action by the Section 5 Court without real concern that their decision will be attacked on appeal.

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[20] Assistant Attorney General Days deposition was taken in the Section 5 case. The pertinent testimony at pages 112-115 of the deposition is reproduced at pages F-1-4 of the Appendix.

[21] As the Petitioners concede in their brief at the top of page 17, Section 5 clearance of the statutory plan would supersede any plan ordered by the district court in Mississippi. Thus, candidates who announced and qualified pursuant to a court-ordered plan would need to requalify under the statutory plan.

This Court might inquire as to why Defendants continue to pursue the statutory plan in view of the contention here that the differences between the so-called compromise plan and the statutory plan are *de minimus*. Conversely, the Court might inquire why the United States and Petitioners urge the compromise plan on the *Connor* court but oppose Section 5 clearance of the statutory plan. The legislature's answer lies in Mississippi's strongly-felt desire once and for all to escape from the aegis of federal court decree in apportionment matters and to proceed to conduct future elections under plans formulated with the political authoritativeness of its own legislature, a power enjoyed by the other 49 states. Mississippi desires to repose the matter of reapportionment in its legislature where it belongs and to demonstrate that it has not only the ability, but also the desire to comply with this Court's pronouncements on constitutional requirements applicable to legislative apportionment. On the other hand, as previously noted, the testimony is clear that members of the class Petitioners purport to represent prefer a plan enacted by judicial decree rather than having its virtual twin enacted by the legislature. (D-48-50)

ARGUMENT II

THE GRANTING OF THE MOTION AND THE ISSUANCE OF THE WRIT WOULD BE INAPPROPRIATE.

Defendants submit that granting the motion and issuing the writ of mandamus would be inappropriate in this action. Defendants entertain no doubt that this Court has the power to direct the district court to proceed to judgment in a pending case " 'when it is its duty to do so'. . . [but the] moving party [must] satisfy the burden of showing that its right to issuance of the writ is 'clear and indisputable.' " *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 2559

(1978) quoting *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943), and *Bankers Life and Casualty Co.* v. *Holland*, 346 U.S. 379, 384 (1953).[22]

This Court is on record holding that,

> Where a matter is committed to the *discretion* of a district court, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.' *Will v. Calvert Fire Ins. Co., supra,* 2559 (emphasis added)

The decision by the Respondents to defer to the Section 5 court for a reasonable period of time was clearly an exercise of *discretion* "appropriate for disciplined and experienced judges." *Kerotest Mfg. Co.* v. *C-O Two Fire Equipment Co.*, 342 U.S. 180, 184 (1952), *a fortiori*, the right to issuance of the writ is not "clear and indisputable." Further, ". . . a litigant's right to proceed with a duplicative action in a federal court can never be said to be 'clear and indisputable.' " *Will* v. *Calvert Fire Ins. Co., supra,* fn 8.

It is our view that this Court should not review via mandamus the interlocutory and discretionary decision by the Respondents below to defer to another federal court whose decision in the matter could end the case before them; we believe Respondents properly exercised their discretion. Confronted with the teaching of *Wise, supra,* the Respondents, had they not stayed their hand in the circumstances outlined in Argument I above, i.e., pending Section 5 action, they could have been successfully charged with error. The Respondents' exercise of discretion to defer

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[22] This Court has never departed from the admonition that, "Mandamus prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy * * * As extraordinary remedies they are reserved for really extraordinary cases. *Ex parte Fahey,* 332 U.S. 258, 259-60 (1947).

entry of judgment is butressed, by implication, by the Section 5 court's decision to proceed expeditiously rather than defer to a decision by the Respondents as requested by the United States.

Certainly, if a United States district court can defer adjudication of purely federal rights to a parallel state court proceeding, *Will* v. *Calvert Fire Ins. Co., supra,* then surely a federal district court can defer to another federal district court — whose decision may be preemptive and thus make further litigation of the question before the deferring court unnecessary. We suggest to this Honorable Court that under the facts of this case, the Respondents not only had the discretion but also the duty, pursuant to the teachings of this Court in *Wise* and *Connor,* to defer to the Section 5 court for a reasonable time. The Respondents have made it crystal clear that they will enter judgment when, in their discretion, imminence of the 1979 elections makes it impracticable to do otherwise, or indeed, earlier if it becomes apparent that Mississippi's request for declaratory relief has not borne fruit. As this Court noted in *Landis* v. *North American Co.*, 299 U.S. 248, 256 (1936),

> We must be on our guard against depriving the processes of justice of their suppleness of adaptation to varying conditions. Especially in cases of extraordinary public moment, the individual may be required to submit to delay not immoderate in extent and not oppresive in its consequences if the public welfare or convenience will thereby be promoted.

Given the negligible difference in the treatment of black voting strength between the Compromise Plan before Respondents and the Statutory Plan before the Section 5 Court, and the confusion that would prevail should two different federal courts enter judgments which have the appearance of permitting implementation of two different apportionment schemes for the 1979 quadrennial elections in Mis-

sissippi, Respondents' determination to give the legislature a reasonable opportunity to pursue Section 5 preclearance before assuming the "unwelcome obligation" of apportioning the state themselves is not so clearly an abuse of discretion that the relief sought by Petitioner should be granted.

CONCLUSION

For the reasons set forth herein, the Defendants respectfully request that the Petitioner's motion for the issuance of a writ of mandamus be denied.

Respectfully submitted,

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